

## Directors and Officers Alert February 2010

### Directors' Duties: at the top of ASIC's agenda in 2010

Directors' duties appear to be at the top of ASIC's agenda in 2010, as the corporate watchdog seeks to challenge the boundaries of Directors' obligations under the *Corporations Act*.

ASIC will appeal the recent Federal Court decision clearing Fortescue Metals Group (**FMG**) and CEO Andrew Forrest. The announcement follows the corporate regulator's third major court loss last year, after cases against AWB Chief Andrew Lindberg and One.Tel founder Jodee Rich were also dismissed.

ASIC was seeking more than \$7 million in fines from FMG, with a \$4 million fine and a disqualification for Forrest, in its latest push to hold corporate executives accountable. FMG was charged with misleading and deceiving the market in a series of media releases announcing an agreement with Chinese Government-owned companies in 2004 relating to the development of a mine, railway and port to export iron ore in Western Australia.

While FMG announced "*binding agreements*" to the market, a subsequent ASIC investigation considered they were merely "*framework agreements*", claiming the releases were premature and designed to inflate FMG's share price.

Bringing 22 charges against FMG and its CEO (in a return to the Directors' and Officers' duties that embroiled former James Hardie directors last year), ASIC alleged Forrest had acted dishonestly and breached his duty of care and diligence to FMG under

section 180(1) of the *Corporations Act* as he:

- was intimately involved in preparing and approving the announcements to the ASX which were under his control;
- knew them to be false and designed to boost FMG's share price; and
- knew the announcements might cause FMG to break the law and damage its reputation.

FMG and Forrest, it alleged, failed to seek legal advice to confirm the agreements were binding. On the last day of the five-week trial, however, the defence produced a number of e-mails and board meeting minutes satisfying the judge that the announcements had been properly considered with the approval of in-house counsel.

Gilmour J in the Federal Court dismissed ASIC's case as lacking proper evidence. His Honour said the Board had no reason to doubt the approval, leaving him with:

*"no hesitation in concluding that FMG and its board, including Forrest, honestly held the opinion that the framework agreements were legally binding"*.



Given ASIC's December announcements that it will also appeal the losses against One.Tel and AWB executives, this challenge signals its increasing rigour in holding Directors accountable for rash decisions which land their companies in trouble with the law. In a media release issued on Thursday, ASIC said:

*"It is part of ASIC's regulatory role to ensure that the laws which impose obligations on listed companies and their executives to keep the market properly informed are properly enforced."*

**With Directors' duties remaining in the spotlight this year, it is prudent to:**

- **evidence your decision-making process with supporting documentation;**
- **evidence the genuine basis for your decision with supporting documentation; and**
- **record all consultations with independent advisers, such as external lawyers and accountants (in particular in the case of complex disclosures).**

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